

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

|   |   |                                     |
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| In the Matter of                            | ) |                                     |
|   | ) |                                     |
| THE BEEPER PEOPLE, INC.                     | ) |                                     |
|   | ) | File Nos. 0000476453 and 0000476454 |
| Request for Waiver of Section 101.81 of the | ) |                                     |
| Federal Communications Commission           | ) |                                     |

**ORDER ON RECONSIDERATION**

**Adopted: May 9, 2002**

**Released: May 14, 2002**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. On November 16, 2001, The Beeper People, Inc. (Beeper) filed a request for reconsideration<sup>1</sup> of the Public Safety and Private Wireless Division's (Division) October 17, 2001 *Order*.<sup>2</sup> In the *Oct. 17 Order*, the Division denied Beeper's request to retain primary status for its licenses to operate 2 GHz band Fixed Microwave Service (FMS) Station WLC691, Newburgh, New York, and Station WLC690, Mt. Beacon, New York, upon the grant of its application to relocate Station WLC691.<sup>3</sup> For reasons set forth below, we deny Beeper's Reconsideration Petition.

**II. BACKGROUND**

2. In 1992, the Commission reallocated portions of the 2 GHz band from FMS to emerging technology (ET) systems, including the personal communications services (PCS).<sup>4</sup> The Commission intended to reaccommodate the FMS licensees in a manner that would be most advantageous to incumbent users, least disruptive to the public, and most conducive to the introduction of new services.<sup>5</sup> Accordingly, first, to preserve the availability of the existing vacant 2 GHz spectrum, the Commission decided to license all new facilities in the 2 GHz band on a secondary basis.<sup>6</sup> Second, rather than immediately clearing the 2 GHz band of the incumbent FMS users, the Commission permitted the incumbents to continue to occupy the band on a co-primary basis with the ET licensees for a significant

<sup>1</sup> Petition for Reconsideration (filed Nov. 16, 2001) (Reconsideration Petition).

<sup>2</sup> The Beeper People, Inc., *Order*, 16 FCC Rcd 18536 (WTB PSPWD 2001) (*Oct. 17 Order*).

<sup>3</sup> *Id.*

<sup>4</sup> Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rule Making*, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992) (*ET First R&O*); see also Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *Notice of Proposed Rule Making*, ET Docket No. 92-9, 7 FCC Rcd 1542 (1992) (*ET NPRM*).

<sup>5</sup> *ET First R&O*, 7 FCC Rcd at 6886 ¶ 5.

<sup>6</sup> *Id.* at 6891-92 ¶ 31; *ET NPRM*, 7 FCC Rcd at 1545 ¶ 23. Secondary operations may not cause interference to operations authorized on a primary basis (e.g., the new ET licensees) and are not protected from interference from primary operations.

length of time, by the end of which the incumbents were to relocate to other spectrum.<sup>7</sup> Third, the Commission restricted the type of modifications and extensions FMS licensees could make to their 2 GHz systems and retain primary status.<sup>8</sup> Fourth, the Commission provided ET licensees with the option of requiring the FMS incumbents to relocate sooner and paying the additional costs caused by the earlier relocation.<sup>9</sup> One practical effect of these rules was that incumbent FMS licensees that were authorized on a primary basis would have the cost of relocating to other bands paid for by the new ET licensees if the ET licensees force them to relocate. On the other hand, ET licensees are under no obligation to relocate 2 GHz links that were authorized on a secondary basis.

3. Beeper currently utilizes the two 2 GHz band FMS stations involved herein, which it acquired by assignment in February 1989, to control base stations providing paging service in the Albany-Newburgh, New York area.<sup>10</sup> On June 20, 2001, Beeper filed applications to modify the licenses for Stations WLC690 and WLC691.<sup>11</sup> In connection with these applications, Beeper sought a waiver of Section 101.81(c) of the Commission's Rules.<sup>12</sup> Beeper's Waiver Request stated,

At the time of the assignment in February 1989, Station WLC691 was located at the residence of Leo Carmody, the owner of the former licensee. Mr. Carmody gave applicant six months from the completion of the transaction to remove the station from his property. In effect, applicant was evicted from the station's authorized location. Applicant would prefer not to have had to move from the authorized location, but had no choice since applicant had no control over Mr. Carmody's decision.<sup>13</sup>

Beeper, apparently without prior Commission approval, relocated the facilities of Station WLC691 to a location within the city of Newburgh, New York,<sup>14</sup> and re-pointed the antenna of the associated Station WLC690 to directionalize it towards Station WLC691.<sup>15</sup>

4. In its June 20, 2001 applications, Beeper sought authorization to modify the licenses for Stations WLC690 and WLC691 to recognize its relocation of Station WLC691, which it appears was done sometime during 1989. Because the changes were major modifications, Beeper requested waivers of Section 101.81 of the Commission's Rules that would otherwise authorize the modifications only on a secondary basis.<sup>16</sup> Beeper argued that a waiver was warranted because its case presented unusual circumstances under which applying the rule according secondary status to its station license would be

<sup>7</sup> *ET First R&O*, 7 FCC Rcd at 6890-91 ¶¶ 22-29; *ET NPRM*, 7 FCC Rcd at 1545 ¶ 24.

<sup>8</sup> *ET First R&O*, 7 FCC Rcd at 6891-92 ¶ 31.

<sup>9</sup> *Id.* at 6890 ¶ 24; *ET NPRM*, 7 FCC Rcd at 1545 ¶ 26.

<sup>10</sup> Reconsideration Petition at 4-5.

<sup>11</sup> FCC 601 Main Form: FCC Application for Wireless Telecommunications Bureau Radio Service Authorization, File Number: 0000476453 (filed June 20, 2001); FCC 601 Main Form: FCC Application for Wireless Telecommunications Bureau Radio Service Authorization, File Number: 0000476454, Exhibit 1 (filed June 20, 2001).

<sup>12</sup> The Beeper People, Inc., Request for Rule Waiver (filed June 20, 2001) (Waiver Request).

<sup>13</sup> *Id.* at 1-2.

<sup>14</sup> Beeper stated that it sought a new location for Station WLC691 as close as possible to the authorized location, and settled on a site 0.7 miles away. *Id.* at 2. Beeper stated that it was not possible to find a suitable location any closer within an area zoned for commercial use. *Id.*

<sup>15</sup> *Oct. 17 Order*, 16 FCC Rcd at 18538 ¶ 6.

<sup>16</sup> *Id.* at 18539 ¶ 9.

inequitable, and it had no reasonable alternative.<sup>17</sup>

5. As support for grant of its requested waiver, Beeper relied on the Division's decision in *Telcom Systems, Ltd. (Telcom)*.<sup>18</sup> In that case, Telcom filed a modification application in order to relocate a 2 GHz station within the city of Marathon, Florida, and sought a waiver of the Section 101.81 to allow the station to retain primary status.<sup>19</sup> Telcom stated that the station was part of a 150-mile path from Miami to Key West, and was essential for providing long-distance voice and data communications in the Florida Keys.<sup>20</sup> In support of its waiver request, Telcom argued that it would have preferred not to relocate the facility, but was compelled to do so because the owner of the tower on which Telcom leased antenna space planned to dismantle the tower.<sup>21</sup> Telcom also stated that its station was located in a sparsely populated area of the Florida Keys and that its proposed new site was the closest suitable location.<sup>22</sup> In our decision granting Telcom's waiver request, we found it highly significant that the relocation was caused by circumstances beyond Telcom's control, and that the station was located in a sparsely populated area and the proposed new site was the closest suitable location.<sup>23</sup> Based on these facts, the Division concluded that the case presented unusual circumstances under which according secondary status to the station license would be inequitable.<sup>24</sup>

6. We rejected Beeper's argument that a waiver grant was warranted, based on the record before us. In this regard, we stated that Beeper's need to relocate Station WLC691 was "apparently in connection with the assignment of the license."<sup>25</sup> Therefore, we decided, Beeper was aware, when it acquired the license, that it would not be permitted to use the same location.<sup>26</sup> As a result, we believed that Beeper could have elected to obtain an initial license to operate at a different location, or to acquire a station that did not have to be relocated.<sup>27</sup> Consequently, we concluded that Beeper had not established that the relocation was "beyond its control."<sup>28</sup> Because Beeper had not substantiated its claim that a waiver was warranted, we denied the request.<sup>29</sup>

7. On November 16, 2001, Beeper filed its Reconsideration Petition. In the Reconsideration Petition, Beeper requested that we reverse our decision in the *Oct. 17 Order* and waive Section 101.81 of the Commission's Rules so that Stations WLC690 and WLC691 may retain primary licensing status.<sup>30</sup>

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<sup>17</sup> *Id.* at 18539 ¶ 10.

<sup>18</sup> See *Telcom Systems Ltd., Order*, DA 99-2296 (WTB PSPWD rel. Oct. 25, 1999) (*Telcom*).

<sup>19</sup> *Id.* ¶ 3.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* ¶¶ 5, 6.

<sup>24</sup> *Id.*

<sup>25</sup> *Oct. 17 Order*, 16 FCC Rcd at 18538 ¶ 6.

<sup>26</sup> *Id.* at 18540 ¶ 11.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 18540 ¶ 12.

<sup>30</sup> Reconsideration Petition at 1-2, 6.

### III. DISCUSSION

8. Beeper argues that the Division's decision in the *Oct. 17 Order* was unwarranted under all the circumstances that existed at the time of the relocation.<sup>31</sup> First, Beeper asserts that the Division improperly assumed that Mr. Carmody's eviction of Station WLC691 from his residential property, after he assigned the station to Beeper, was a condition of the purchase and sale transaction.<sup>32</sup> We believe that the inference drawn in the *Oct. 17 Order* was reasonable given the information Beeper provided in its Waiver Request. In any event, Beeper now states:

Whether the need to relocate was a condition of the transaction is clouded by the fact that the principal of Beeper who handled the transaction . . . is now deceased. Moreover, review of the contract . . . does not reflect that the need to move the station from Carmody's premises was a condition of the transaction. Accordingly, it appears that the [Division's] assumption *may* be unwarranted.<sup>33</sup>

Significantly, even in its Reconsideration Petition Beeper fails to definitively establish whether the relocation was a condition of the transaction by which it acquired Station WLC691. Therefore, we continue to believe that our conclusion in the *Oct. 17 Order* was warranted based on the information presented in this proceeding since Beeper has not provided evidence to the contrary.<sup>34</sup> A party requesting a rule waiver bears the burden of persuasion.<sup>35</sup> Because Beeper did not and has not substantiated its contention that the relocation was beyond its control, we affirm our prior decision regarding this matter.

9. Beeper also argues that even if the relocation was a condition of the sale, it still should be considered beyond its control, and thus a waiver should have been granted pursuant to the *Telcom* precedent, because Station WLC691 was "part of a package of stations acquired from Carmody, comprising an ongoing common carrier paging service."<sup>36</sup> We disagree. That Beeper also acquired other stations from Carmody does not negate the fact, as noted in the *Oct. 17 Order*, that Beeper had alternatives to relying on Station WLC691.<sup>37</sup> Moreover, the *Telcom* decision was not based solely on the fact that the relocation was beyond the licensee's control. Also integral to our decision there was the fact that the station was located in a sparsely populated area, as part of an extended microwave path.<sup>38</sup> That is not the case here. In addition, we find that the fact that Beeper now seeks to retroactively repair an

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<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 2-3 (emphasis added).

<sup>34</sup> Moreover, in a letter to the Enforcement Bureau while its waiver request was pending, Beeper seems to indicate that the relocation was a condition of the sale. See Letter from The Beeper People, Inc. to Rocco Campagna, Technical and Public Safety Division, Enforcement Bureau, at 2 (received Aug. 16, 2001) ("At the time of the assignment, [S]tation WLC691 was physically located at the residence of Leo Carmody, the owner of the former licensee. Mr. Carmody had given the company six months from the completion of the transaction to remove the station from his property.").

<sup>35</sup> See, e.g., *Winstar Broadcasting Corp., Memorandum Opinion and Order*, 17 FCC Rcd 6126, 6128 ¶ 9 (2002); *Martin W. Hoffman, Order*, 16 FCC Rcd 11431, 11433 ¶ 7 (2001).

<sup>36</sup> Reconsideration Petition at 3-4.

<sup>37</sup> *Oct. 17 Order*, 16 FCC Rcd at 18540 ¶ 11.

<sup>38</sup> *Telcom*, ¶¶ 5, 6.

unauthorized modification, a circumstance not present in *Telcom*, is a relevant factor affecting our analysis of whether a waiver should be granted under the present facts.<sup>39</sup>

10. Finally, Beeper notes that grant of its modification applications would not increase relocation costs for the eventual ET licensee.<sup>40</sup> The Commission has concluded, however, that the effect on relocation costs is a factor only with respect to applications for minor modifications, not, as Beeper has requested, major modifications.<sup>41</sup> It also suggests that the equities favor grant of a waiver, because it is a small business in a weak industry, so the burden on it will be greater than it will be on the ultimate ET licensee, which probably will be a large nationwide carrier.<sup>42</sup> We do not find this factor alone to constitute a sufficient basis upon which to grant a waiver. We have previously determined that the fact that a licensee is a small business is not a sufficient sole basis for granting a waiver of Section 101.81 of the Commission's Rules.<sup>43</sup>

#### IV. CONCLUSION AND ORDERING CLAUSES

11. Taking into consideration all the facts and circumstances of the matter before us, we conclude that Beeper's Reconsideration Petition should be denied. We therefore affirm our decision in the *Oct. 17 Order* denying Beeper's request for a waiver of Section 101.81 of the Commission's Rules.

12. **ACCORDINGLY, IT IS ORDERED** that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Reconsideration Petition, filed on November 16, 2001, by the Beeper People, Inc. **IS DENIED.**

13. This action is taken under designated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

#### FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Commission

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<sup>39</sup> See Wisconsin Elec. Power Co., *Order*, 16 FCC Rcd 22440, 22443-44 ¶ 11 (WTB PSPWD 2001) ("We see no inequity in distinguishing between a properly authorized pre-1996 major modification and a pre-1996 major modification for which authorization was not requested until 2001. We expect FCC licensees to provide all technical information regarding [their] station[s]' facilities in a timely manner so as to demonstrate compliance with all the technical requirements of the Commission's Rules. Further, if prior FCC approval is required before certain technical changes are made, we expect FCC licensees to obtain such approval in advance of making the changes rather than post-implementation thereof. In addition, correct information is necessary to the frequency coordination process. Having neglected to file a timely modification application, Wisconsin Electric is rightly subject to the rules governing post-1996 modifications.") (citations omitted).

<sup>40</sup> Reconsideration Petition at 5.

<sup>41</sup> See, e.g., Wisconsin Electric Power Co., 16 FCC Rcd at 22443 ¶ 10.

<sup>42</sup> Reconsideration Petition at 5-6.

<sup>43</sup> See, e.g., Cambridge Tel. Co., *Order*, 16 FCC Rcd 15409 (WTB PSPWD 2001).

